

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

SITE PRO-1, INC., )  
Plaintiff, ) No. CV-06 6508  
v. ) JUDGE GLASSER  
BETTER METAL, LLC, ) MAGISTRATE JUDGE REYES, JR.  
Defendant. ) JURY DEMAND

**NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE that pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the defendant, Better Metal, LLC (“Better Metal”), will move this Court before the Honorable I. Leo Glasser to dismiss all counts of the plaintiff’s Complaint for failure to state a claim on which relief can be granted. The Complaint is ripe for dismissal because it does not contain factual allegations sufficient to demonstrate a “trademark use in commerce,” a necessary element for each cause of action asserted. Additionally, the Complaint fails to allege bad faith by Better Metal, an element necessary to the plaintiff’s cause of action titled “common law unfair competition.” The Complaint also fails to allege that the plaintiff owns an unregistered trademark, and thus fails to allege an element necessary to the plaintiff’s cause of action under 15 U.S.C. § 1125(a). Wherefore, Better Metal moves that the Complaint be dismissed in its entirety.

Pursuant to Section IV of the Individual Rules of Senior Judge I. Leo Glasser, no return date is included with this motion. Undersigned counsel will arrange a briefing schedule with counsel for the plaintiff and will submit courtesy copies of all relevant papers when the motion has been fully briefed.

Dated: February 9, 2006.

Respectfully submitted,

/s/ Jonathan D. Rose  
Thor Y. Urness (TU3908)  
Jonathan D. Rose (JR8848)  
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*Attorneys for Better Metal, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing is being forwarded via ECF, to:

John F. Gallagher, III, Esq.  
THE FARRELL LAW FIRM  
333 Earle Ovington Blvd.  
Uniondale, NY 11553

on this the 9<sup>th</sup> day of February, 2006.

s/ Jonathan D. Rose  
Jonathan D. Rose